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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of
the Cities of San Jose and Santa
Clara for Review of Cease and Desist
Order No. 79-147 of the California
Regional Water Quality Control Board,
San Francisco Bay Region. Our File
No. A-256.

Order No. WQ 80-6

BY THE BOARD:

On November 16, 1979, the State Water Resources Control Board (State Board) received a petition from the Cities of San Jose and Santa Clara (Petitioners) for review of Paragraph H of Cease and Desist Order No. 79-147. Order No. 79-147 was adopted by the California Regional Water Quality Control Board, San Francisco Bay Region (Regional Board) after a public hearing on October 25, 1979, concerning violations of the waste discharge requirements contained in Order No. 77-107 (NPDES Permit No. CA0037842), as amended by Order No. 78-92.

I. BACKGROUND

The San Jose-Santa Clara Water Pollution Control Plant treats and disposes of wastes from the communities of San Jose, Santa Clara, Saratoga, Milpitas, Los Gatos, Campbell and Cupertino. The facility is jointly owned by the Cities of San Jose and Santa Clara, and is operated by the City of San Jose pursuant to a contract. The City has operated the secondary portion of the

plant for a number of years. New tertiary treatment processes began operating in April, 1979. The plant discharges to Artesian Slough which flows to Coyote Creek and then to South San Francisco Bay, a sensitive ecosystem with limited waste dispersion and dilution capabilities.

Requirements for this waste discharge are contained in Order No. 77-107, as amended by time schedule Order No. 78-92. An upset in the secondary treatment phase of Petitioners' plant around Labor Day, 1979, resulted in waste discharges in violation of requirements during the period from September 6, 1979, to October 9, 1979. As a result of these discharges the Regional Board adopted Order No. 79-147 directing the Petitioners to comply immediately with waste discharge requirements and to take a number of steps to preclude the recurrence of discharge violations and to limit the impact of process upsets. Petitioners seek review of only one provision contained in this order. That provision, Paragraph H, states:

"The discharger shall report forthwith on the feasibility of the formation of a sanitation district or other appropriate public entity for the purposes of operation of sewage treatment plant."

The findings in Order No. 79-147^{1/} state that the waste discharges in violation of requirements were due in part to

1/ Finding 6 of Cease and Desist Order No. 79-147 describes the causes of waste discharge violation as follows: "The violations cited in Finding 3 of this Order were due to a biological upset of the secondary treatment process which was probably caused by one or more of the following factors: Inadequate hydraulic or organic treatment capacity; high organic loadings; inadequate operational control of the treatment process; and/or inadequate treatment plant staffing with the major factors the inadequate operational control of the treatment process and inadequate treatment plant staffing."

inadequate staffing, maintenance and operation at the Petitioners' plant. Evidence was received that Petitioners had not been able to maintain the treatment plant staff at full strength since mid-1978. This problem was exacerbated by the start up in 1979 of the new tertiary system which requires additional skilled staff. At the time of the discharge violations cited by the Regional Board, 10 of the 40 treatment plant staff positions appropriate for these facilities were vacant. Among the reasons offered to explain the vacancies were limitations on salary increases.^{2/} The sanitary engineer position, which provides analyses of trends shown by monitoring data and guidance on steps to adjust the treatment processes, had been vacant since February, 1979, and was vacant at the time of the start up of the tertiary system.

The record indicates that staff vacancies contributed to delays in recognizing and correcting treatment process problems, and in taking measures to prevent process upsets. For example, Petitioners testified that limited personnel were available to respond to the secondary treatment process upset. With Provision H, set forth above, the Regional Board was seeking information to

^{2/} The terms of the salary limitations referenced are not clear from the record herein. The City of San Jose indicated that since state funds had been received following the passage of the Jarvis-Gann Initiative (Proposition 13; June, 1978), no salary increases were permitted to City employees. In February, 1979, the California Supreme Court found the limitations to be unconstitutional. However, the City then applied the federal guidelines of seven percent increases. It was also stated that the treatment plant operations were funded by service and use charges, which were not expected to be limited by Proposition 13, rather than by general funds.

determine whether changes in the municipal structure responsible for staffing and operating the plant would be appropriate and desirable to avoid new discharge violations and further impairment of water quality in South San Francisco Bay.

II. CONTENTIONS

Petitioners contend that Paragraph H of Order No. 79-147 is improper in that the Regional Board lacks the authority to direct either the manner in which a discharger complies with requirements or a change in the governmental structure controlling particular treatment facilities. Petitioners assert that Paragraph H is also improper in that it intrudes in matters reserved to local government. Petitioners object to the inclusion of such a term in a cease and desist order, violations of which may be referred to the Attorney General to seek civil penalties.

III. FINDINGS AND DISCUSSION

For the reasons stated below we find that it was not appropriate to include Paragraph H in Cease and Desist Order No. 79-147. Under the terms of the Porter-Cologne Act (Water Code, Division 7, commencing with Section 13000), especially Water Code Section 13267, the Regional Board may require dischargers and public agencies to prepare investigational reports and to submit data on a variety of water quality related subjects. However, absent clear justification, we feel it is inappropriate to include such requirements in an enforcement order, for which monetary penalties could be sought without further hearing. This is especially true for a term, such

as Paragraph H, upon which the Regional Board may not require implementation action by the dischargers.

Waste discharge requirements typically specify the effluent quality to be produced by a treatment plant and receiving water conditions to be maintained. Water Code Section 13360^{3/} states that the Regional Board may not specify the manner in which a discharger must comply with requirements, except under certain circumstances which are not present in this case. In our view, even though Paragraph H is a reporting requirement, it deals with matters of local politics and may fall within the proscription against requiring compliance in a specific manner. The discharge in this case is governed by an NPDES^{4/} permit issued pursuant to the Clean Water Act (33 U.S.C. 466 et seq.) and the Water Code. We know

^{3/} Water Code Section 13360 provides, in pertinent part: "No waste discharge requirement or other order of a regional or state board or decree of court issued under the provisions of this division shall specify the design, location, type of construction or particular manner in which compliance may be had with such requirement, order or decree, and the person so ordered shall be permitted to comply therewith in any lawful manner;...."

^{4/} "NPDES" means National Pollutant Discharge Elimination System, the discharge permit system established by Section 402 of the Clean Water Act as amended by P.L. 92-500, and administered by the states and the Environmental Protection Agency.

of no federal regulation ^{5/} which might supersede the terms of the Water Code and empower the Regional Board to require that a particular entity operate a facility subject to an NPDES permit.

Although the Regional Board's concern about public agency accountability and responsibility for treatment plant management was well placed, and although the Board was asked by the Mayor of Santa Clara to consider requesting a study of the feasibility of forming a joint power authority to handle waste treatment, we agree with the petitioners that a requirement that such a study be made would improperly address an area reserved ^{6/} to local government. Since there is a separate mechanism for requiring data to be produced for the information of the

^{5/} Presently we are aware of only one instance in which the Regional Board could select the public agency to operate community treatment facilities, that is, if an adopted and approved plan prepared pursuant to Section 208 of the Clean Water Act designates a particular public entity to operate facilities and an NPDES permit is required. Then, to issue a permit for the discharge to another agency would be inconsistent with the Section 208 plan and proscribed by Section 208(e) of the Clean Water Act. Section 208(e) states "No permit under Section 402 of this Act shall be issued for any point source which is in conflict with a plan approved pursuant to subsection (b) of this section." No evidence was presented to indicate that a change in public entity was required by an approved Section 208 plan, nor did the Regional Board so argue.

^{6/} See Water Code Sections 13225, 13267, and 13268; also 40 Code of Federal Regulations Sections 122.14(g), and 122.20 et seq. A change of public entity could constitute cause for modification or revocation and reissuance of a permit. [40 CFR 122.14(e)]

Boards, dischargers and other public agencies, and since directing a change in the public agency controlling a discharge would not be permitted under Water Code Section 13360 in this case, Paragraph H should be deleted from Order No. 79-147.

IV. CONCLUSION

After review of the record, and for the reasons expressed above, we conclude that Paragraph H should not have been included in Order No. 79-147.

V. ORDER

IT IS HEREBY ORDERED that Paragraph H of Order No. 79-147 of the San Francisco Bay Regional Water Quality Control Board is rescinded.

Dated: March 20, 1980

ABSENT

Carla M. Bard, Chairwoman

ABSENT

William J. Miller, Vice Chairman

/s/ L. L. Mitchell

L. L. Mitchell, Member

/s/ Jill B. Dunlap

Jill B. Dunlap, Member

/s/ F. K. Aljibury

F. K. Aljibury, Member

